No. 15,335

United States Court of Appeals

For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,

Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

I.

REPLY TO APPELLEES' ARGUMENT THAT TRANSCRIPT OF RECORD IS INCOMPLETE.

(A) The testimony of Land and the testimony of Correia were both placed in evidence before the United States District Court as exhibits.

Both briefs for the two appellees in this case assert repeatedly and emphatically that this Court is foreclosed from considering the testimony of Land and

Correia and arguments based thereon for the reason that such testimony was not reprinted in the transcript of record designated by appellant under Rule 17 of this Court. (Brief of Ohio Farmers, page 2, *et seq.* and brief of Prudential Assurance, page 34.) It appears, however, that such testimony was placed before the District Court as Exhibits 1 and 2 in evidence. Exhibit 3 contains the forms of verdict offered the jury in the State Court action, and Exhibits A and B refer to instructions given the jury by the State Court.

The writer of this brief, embarking on his first case before a United States Court of Appeals, read Rule 17 very carefully and twice made specific oral inquiry at the office of the Clerk of this Court concerning just what material had to be designated for printing. On each such occasion, the undersigned was specifically informed by the Clerk's office that this Court, in the interest of economy and brevity, made it a practice to consider, and would consider, exhibits received in evidence by the United States District Court and made part of the record on appeal in this Court, even though such exhibits were not reprinted in the transcript of record. It was in direct reliance upon such specific information that the undersigned did not have the exhibits reprinted as part of the transcript of record. If the information given to the undersigned was erroneous, the undersigned will move the Court at the hearing of this case for its order permitting all parts of the exhibits to be printed in full, and defering submission until such printing may be accomplished.

(B) The record on appeal is complete in this case.

The certificate of the Clerk of the United States District Court to the record on appeal is reprinted at R. 62-64. As may be seen at R. 64, Plaintiff's Exhibits 1, 2 and 3 and Defendants' Exhibits A and B, all of the evidence before the District Court, were duly designated as part of the record on appeal. This fact distinguishes clearly the two cases cited at the top of page 34 of Prudential's brief. In both of those cases, certain exhibits were not designated by appellant as part of the record and therefore were not before the Appellate Court. In the case at bar, all exhibits were designated as part of the record and are before the Appellate Court.

II.

APPELLEES MISCONCEIVE WHERE THE BURDEN OF PROOF LIES IN A DECLARATORY RELIEF ACTION.

This is an action in declaratory relief. Appellant seeks a determination of the rights and liabilities of all carriers with reference to the liability assessed in the State Court action against Louis Stores, Inc., and its employees, paragraph V of first amended complaint in declaratory relief, R. 4. In this kind of action, both sides ask the Court to apply all the law that may be applicable and each side introduces all the evidence which it feels may sustain its contentions. Both appellees claim emphatically in their briefs that appellant had the burden of proof, Ohio Farmers' brief, bottom of page 6, and Prudential's

brief, bottom of page 26. In this part of the reply brief, appellant will seek to show that appellees err in their contentions about where the burden of proof lies in this kind of action; that each side to a declaratory relief action has the burden of proving its affirmative contentions; that appellant has proved, beyond any doubt, its contention that the State Court verdict against Louis Stores, Inc. was based on *respondeat superior*; that appellees make the affirmative contention that the State Court verdict was, or may also have been, based upon alleged "independent negligence" of Louis Stores, Inc.; that appellees have not sustained their burden of so showing; that, as a matter of fact, appellees have not placed before the District Court or this Court one shred of evidence to support their affirmative contention, although they had ample opportunity to bring before the District Court all of the proceedings of the State Court; and that appellees somehow seek to twist appellant's alleged failure to disprove completely their affirmative contention into an argument that such contention has been proved, when, in fact, no evidence at all has been adduced in support of it.

(A) In an action for declaratory relief, the burden of proof depends upon the issue or contention being asserted.

In *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.,* 178 F. 2d 541, this Court said, at 178 F. 2d 546:

> "In the last analysis, whether we are dealing with an ordinary action or one for declaratory relief, the question of who has the burden of

proof is determined not so much by the position of the parties or by choosing *who the actor in the law suit is,* as by the *nature of the relief asked for and granted.* (Emphasis by the Court.) Borchard, Declaratory Judgments, 2d Ed., 1941, pp. 404-409. So far as the Federal declaratory judgment statute is concerned, the matter has been very lucidly stated by the Court of Appeals for the Eighth Circuit in Reliance Life Insurance Co. v. Burgess, 8 Cir., 1940, 112 F. 2d 234, 237: 'The question as to who must sustain the burden of proof in a declatory judgment suit is a comparative new one, which we think does not permit of a categorical answer. It must depend, as in other classes of litigation, upon the condition of the pleadings and the character of the issues at the time the question is presented. . . .''

Similarly, in *Northwestern National Casualty Co. v. Bettinger,* 213 F. 2d 200, affirming 111 Fed. Supp. 511, the Court held that after the plaintiff insurer had made out a *prima facie* case, the burden of proof then shifted to the intervenor, 111 Fed. Supp. at 515-516.

This question is discussed by a recent note in 9 Okla. Law Review 180.

(B) Plaintiff-appellant has proved that the State Court's verdict against Louis Stores, Inc., was necessarily based upon respondeat superior.

The material in appellant's opening brief, from the bottom of page 4 to the middle of page 7, and the discussion under subhead B, pages 20-25, of said brief, are hereby incorporated by reference without repeating at length.

It is clear from the facts admitted by stipulation in the United States District Court that the State Court pleadings alleged all acts of Clifton Land were committed in the scope and course of his employment for Louis Stores, Inc., and it is also clear that the State Court pleadings admitted such allegation. It is clear from Land's testimony, all of which is in the exhibits before this Court, that it was he who deliberately pushed the carton into the position where Mrs. Christensen tripped over it. It is clear that the State Court jury, in returning its verdict against Land, necessarily found him negligent. It is clear from the State Court Judge's instruction to the jury, reprinted at R. 25 as part of appellant's request for admissions in the Court below, that the jury was instructed that if they found either Land or Correia negligent, while acting in the course and scope of their employment for Louis Stores, Inc., then the jury *must* impute such negligence to the employer Louis Stores, Inc., and find against both. That instruction is also printed in brief for Ohio Farmers at pages 15-16.

Since the only allegation against Land was negligence, since it was admitted that Land was acting in the scope of his employment at the time, and since the jury actually found against Land, and since they were instructed that if they found against Land they must also find against Louis Stores, Inc., it has been proved that that verdict was based upon *respondeat superior.*

(C) Appellees contend that the verdict against Louis Stores, Inc., was also based upon "independent negligence"; but they have adduced absolutely no evidence to support their contention.

Appellees' argument for this proposition is based almost wholly upon an instruction given the State Court jury by Judge Ledwich. That instruction was submitted by Mr. Walcom, who represented Land and Correia in the State Court action at the instance of appellee Ohio Farmers, and it is before this Court as Exhibit B in evidence. It is also reprinted in Ohio Farmers' brief, at pages 16-17. The only other item by which appellees seek to support their argument is the fact that the State Court Judge prepared several forms of verdict for the convenience of the jury, including one verdict against the corporation only (part of Exhibit 3). That form of verdict, however, was *specifically rejected* by the jury which, as has been reiterated, found against Land based on his negligence.

The most significant observation to be made concerning that instruction and that form of verdict is that neither of them represents any *evidence* that was before the State Court in the personal injuries action. They represent only Mr. Walcom's *theory* of such evidence—a theory which was specifically rejected by the trier of fact in the State Court action and which is therefore of no value in determining the issues before this Court.

Under the law which governs the State Courts in California, neither a jury instruction nor an unused form of verdict is evidence. Evidence is defined by

California Code of Civil Procedure 1823 as the means, sanctioned by law, of ascertaining in a judical proceeding the truth respecting the question of fact. C.C.P. 1827 specifies the four kinds of evidence, as follows:

"1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses."

By "the knowledge of the court" the California Legislature did not mean the reasons that lead the Court to give jury instructions offered by any party in an effort to prove its theory of the case. The legislature meant objects of judicial notice, as specified in C.C.P. 1875 under the heading "Knowledge of the Court."

The only *evidence* from the State Court proceedings that was placed before the United States District Court and before this Court is Exhibits 1 and 2, the complete testimony of Land and Correia. It is admitted that Mr. Walcom called no other witness in the State Court action; request for admissions, paragraph 8, at R. 24-25.

Attention is directed to the precise language of the State Court's instruction which is Exhibit B before this Court. The State Court said, albeit parenthetically, that Land *was* at all times complained of the servant of the master Louis Stores, Inc. The State Court Judge impliedly told the jury, in the first half of that instruction, that *if* they found Land was

merely following instructions of his master, then they need not find against Land; hence the jury must have found, contrary to what appellees contend, that Land was *not* merely following directions, and that Land was negligent.

In this connection, the cases cited at pages 35-36 of Prudential's brief are not in point. In *Benson v. Southern Pacific Co.,* 177 Cal. 777, 171 P. 948, the jury failed to find one way or the other concerning the employee and the Court held that the error was waived by a failure to request that the jury be directed to find on that issue.

The case of *Newman v. Fox West Coast Theatres,* 86 Cal. App. 2d 428, 194 P. 2d 706, is distinguishable on the grounds that the employee was exonerated; that the employee did not actually *create* the danger, but merely omitted to clean it in time; and that the rules promulgated by the defendant corporation required more people to be there than were there on the night in question. In the case at bar, Land actively created the danger; Land was held liable; and Correia, the store manager who *determined* the number of people to be present at any one given time, was exonerated.

In *Jensen v. Southern Pacific Co.,* 129 Cal. App. 2d 67, 276 P. 2d 703, the employee was exonerated. In that case, however, there was *evidence* that the railroad was negligent in its determination of what warning signals should be erected. In the case at bar, there was no evidence of any kind of negligence or even of acts by the corporation other than through

Land, who was held negligent, and through Correia, who was not held negligent.

The case of *McInerney v. United Railroads,* 50 Cal. App. 538, 195 P. 958, cited by appellee Prudential, at page 36 of its brief, is, on analysis, favorable to appellant's position herein. In that case, the employee, who was following specific orders, was exonerated. He had been ordered to send out guards, who assaulted the plaintiff. In the case at bar, however, there is no evidence that Land had been ordered to leave the box in the aisle; if he had been so ordered, then he should have been exonerated. The evidence is just the opposite: Land had been ordered never to leave a box in the aisle. Land was not merely following orders and that is why he was held liable, in spite of Mr. Walcom's able efforts to persuade the jury otherwise. If the State Court trial included any *evidence* of negligence on the part of Louis Stores, Inc., other than the acts of Land and the acts of Correia, appellees herein had ample opportunity over a long period of time to bring such evidence to the attention of the United States District Court. They have failed completely to do so, thereby failing in their burden of proving their contention that such evidence existed.

Lastly, appellee Ohio Farmers argues at page 18 of its brief that it "must be conclusively presumed" that the Superior Court properly instructed the jury because Louis Stores, Inc., has not appealed from the judgment. Such is not the case. Judge Ledwich merely leaned over backward, so to speak, giving Mr. Walcom's instruction, in order to give Mr. Walcom every

opportunity to convince the jury of his theory of the case, namely, that Land should be exonerated because he was merely following instructions. If there was error in giving Mr. Walcom's instruction (Exhibit B), that error is harmless, in view of the result, and an appeal would be an idle gesture. It is certain that had the Superior Court jury found against Louis Stores, Inc., only, exonerating both the man who left the box in the aisle and the man in charge who instructed him and determined the number of people on duty, then there would have been an appeal by Louis Stores, Inc., and it would have been successful.

III.

APPELLEES ARE SPECIFICALLY OBLIGATED BY THEIR POLICIES TO PAY THE STATE COURT JUDGMENT AGAINST CLIFTON LAND.

It would be redundant to repeat here the argument made at pages 10-19 of appellant's opening brief concerning Endorsement No. 4 of the Ohio Farmers' policy and the specific request made under it by the attorney for Louis Stores, Inc., that Ohio Farmers assume the defense of the employees. It should be pointed out, however, in reply to the arguments made in the appellees' briefs, in particular, Prudential's brief, pages 9-18, that the term "insured" embodies a legal conclusion which a Court may apply to a relationship. The essential fact is not, as appellees seem to think, whether the insurance company chooses to apply the word "insured" to an individual. The

question is whether or not an insurance company, under certain circumstances, undertakes to indemnify another person under its policy. If it does, as clearly Ohio Farmers has in this case, then it is the insurer, and the person so indemnified is the insured, California Insurance Code, Section 23. It is specious and meaningless to argue, as appellees have, that in one breath they may say Land is not an "insured," and in the next breath that their Endorsement No. 4, even though it specifically obligates them to pay any loss by liability imposed upon any said employees, is a mere "supplemental agreement," without any significance and without imposing any obligation upon appellees. Appellees make this argument in the face of paragraph 5 of Endorsement No. 4, R. 53, reading,

> "5. *The Insurance provided by this endorsement* shall be excess insurance over any *other* valid and collectible insurance available *to any employee* of the *named insured.*" (Emphasis supplied.)

(A) Appellees' argument of "stranger to the contract" has no relevance to this case.

In this argument, appellees once more ignore the nature of the declaratory relief suit. Appellant requests this Court to consider all the law applicable in making a just declaration of the rights and liabilities of all parties to this suit, based upon all the circumstances. Of course, one insurance company is always a "stranger to the contract" of another insurance company. Yet, it is clear that declaratory relief actions lie among insurance companies, and in such

actions the courts interpret the contracts in the light of all the applicable statutes and precedents. In *Canadian Indemnity v. U. S. F. & G.,* 213 F. 2d 658, it seems clear that U. S. F. & G. was a "stranger to the contract" between Canadian Indemnity Company and Thomas Rigging. That fact is absolutely without significance. Even Thomas Goff, held to be Canadian's insured, was a "stranger to the contract," similarly without significance.

Similarly, in *Continental Casualty Co. v. Phoenix Construction Co., et al.,* 46 Cal. 2d 423, 296 P. 2d 801, each company was no doubt a "stranger to the contract" of the other. This argument sheds no light upon the declaration sought.

Referring more specifically to Prudential's argument, the case of *Transportation Guarantee Co. v. Jellins,* 29 Cal. 2d 242, 174 P. 2d 265, is not at all in point because it does not construe a contract of insurance at all.

American Lumbermen's Mutual Casualty Co. v. Trask, 266 N.Y.S. 1, cited at page 13 of Prudential's brief and at page 27 of Ohio Farmers' brief, involves a specific statute, namely, the financial responsibility law of New State interpreted by a New York Court. It was not a declaratory relief action. It does not state the law of California. It dealt only with the subrogation rights of the carrier against a third party who had borrowed the car of its insured, as those rights existed under a specific state statute. Hence, it is not here in point.

Chamberlin v. City of Los Angeles, 92 Cal. App. 2d 330, 206 P. 2d 662, cited at page 14 of Prudential's brief, is not in point at all. It holds only that no cause of action lies against an insurance company unless a final judgment is first obtained against a person whose liability the insurance company is obligated to discharge.

In the middle of page 13 of Prudential's brief, Prudential remarks that . . . "the rule (that any ambiguity must be resolved against the insurer) has no application if the insured is responsible for the language used. . . ." This statement on the part of Prudential is grossly misleading, if it seeks to imply to this Court that Louis Stores, Inc., was in any way responsible for the language used in that endorsement. There is no such evidence, nor even such suggestion and it is submitted that the presumption is otherwise.

Lastly, at page 18 of its brief, Prudential miscites the case of *Vyn v. Northwest Casualty Co.,* 47 A. C. 84, 301 P. 2d 869, for the proposition that appellees need not pay Land's liability to Mrs. Christensen in this case, because the event (the accident) was known prior to the time that Land's defense was assumed by Ohio Farmers. The *Vyn* case holds that no contract of insurance had yet come into being at the time of the accident, because the premium was not yet paid. Hence, there was no contract of insurance at all. In the case at bar, there is no dispute that there were valid contracts of insurance on the part of both appellees. The only question is whether those con-

tracts obligate appellees to discharge Land's liability under the facts.

(B) Reply to Prudential's argument that it does not insure Land, even if Ohio Farmers does.

Two groups of underwriters at Lloyd's London had excess policies in force at the time of the Christensen accident, both of them specifically based upon the Ohio Farmers' policy as the underlying policy. Ohio Farmers carried $10,000 worth of coverage. The first Lloyd's excess policy, that of appellee Prudential and its group of underwriters, carried $40,000 beyond the Ohio Farmers $10,000, thus raising the coverage to $50,000. The second Lloyd's policy, that of Frank B. Allison and other underwriters, carried $450,000 beyond the previous $50,000, thus making the total $500,000. (Findings of fact VIII and IX, R. 54.) (The second group of Lloyd's underwriters, although defendants in the United States District Court suit in declaratory relief, were not made parties to the appeal, because the judgment against Clifton Land was for less than $50,000, so that their policy would not come into effect.)

At pages 18-25 of Prudential's brief, it argues that it is not obligated to discharge the State Court judgment against Land, regardless of the liability of Ohio Farmers. This assertion is made, in spite of the fact that its policy specifically states that the Ohio Farmers policy is the underlying policy to which it is excess.

At page 19 of its brief, Prudential cites California Insurance Code 387 for the proposition that a policy

of insurance may be applied only to the interest of "the person intended to be insured . . ." With that abstract statement of principle, appellant has no quarrel, but Prudential misapplies it to the instant case. Endorsement 4 to Ohio Farmers' policy, an integral part of the policy underlying Prudential's policy, says that Ohio Farmers will discharge the liability imposed upon Land. Hence, Land is specified in the policy. For the most recent statement of state law on this subject, attention is directed to *Olson v. Standard Marine Insurance Co. Ltd.,* 109 Cal. App. 2d 130, 240 P. 2d 379 (hearing denied by State Supreme Court). In that case, the argument made by defendant insurer was similar to the argument advanced by Prudential herein. The California Appellate Court, at 109 Cal. App. 2d 135, after stating that argument, held as follows:

> ". . . It reasons therefrom that only respondent Olson was insured and only as to such property in which she had an insurable interest. With this construction of the policy we cannot agree. It not only violates the clear import of the language but also is contrary to the well established rules of construction of insurance policies. Appellant would have us hold that only the property owned by a member of respondent Olson's family that is insured is that in which respondent Olson has an insurable interest such as a community property interest in the property of a spouse or an interest in that of a minor child. Such a construction would give little if any effect to the 'family' clause since members of a family own much of

such property outright. Furs and jewels of a wife are frequently the result of gifts and therefore not community property. It would result in appellants being absolved from liability on 80% of the articles for which it accepted a premium. If we considered these terms of the policy were ambiguous we would be forced to come to the same conclusion because of the established rules of construction. A contract of insurance should be most strongly construed against the insurer if such construction is fairly reasonable . . ."

At pages 20 and 21 of its brief, Prudential admits, as it must, that its policy by its own language is subject to the same warranties, terms and conditions as are contained in, *or as may be added to* the policy of the primary insurers. Prudential then proceeds to state on page 22 that the expression "warranties, terms and conditions" excludes paying the liability imposed on Land as required by Ohio Farmers' policy Endorsement No. 4. It argues, without citation of any authority, that the word "terms" should be equated with "hazards insured against," and includes no more. It is submitted, as a matter of basic semantics, that if the underwriters at Lloyd's in drafting their policy had meant "hazards" instead of "terms," they could easily have said "hazards." "Terms" includes more than "hazards" as a matter of ordinary dictionary definition, apart from any question of law. Thus, the following definitions are submitted from Webster's New World Dictionary of the American Language (1951):

> Hazards: "risk; peril; danger; jeopardy;
> Terms: conditions of a contract, agreement, sale, etc. that limit or define its scope or the action involved . . ."

Prudential next makes the following argument at pages 23-24 of its brief: That since Prudential and the other Lloyd's underwriters are not obligated to investigate and defend, and because Ohio Farmers' responsibility to discharge the judgment against Land is conditioned upon its having defended Land, that therefore Prudential has no responsibility to discharge the judgment against Land.

It is submitted that this argument by Prudential may quickly be reduced to an absurdity. Under their excess policy, the Lloyd's underwriters have no obligation to investigate or defend *anyone,* including the named insured Louis Stores, Inc., condition No. 5 of Prudential's policy, R. 16. Referring now exclusively to Louis Stores, Inc., the named insured, it was Ohio Farmers that had the specific obligation to defend any suit against the insured alleging injury covered by the policy, and to pay all judgment taxed against the insured in any *such suit,* R. 2. Ohio Farmers was similarly obligated to defend the employees under Endorsement No. 4, and then to pay the liability assessed against them. Surely, Prudential could not argue that it was not obligated to pay a judgment against Louis Stores, Inc., simply because Ohio Farmers' liability to pay that judgment was conditioned upon Ohio Farmers' obligation to defend, while Prudential had no obligation to defend. The case with

reference to the employees is just the same. In other words, the Lloyd's policies are excess policies for the payment of liability after liability has been established. The Lloyd's policies specifically say that they need not defend, but that defense is the responsibility of the primary carrier, Ohio Farmers. If this argument of the Lloyd's underwriters applies to Land, then it applies similarly to the very named insured, Louis Stores, Inc. It would mean that Lloyd's has no liability under any circumstances to anyone. But such a conclusion would be absurd.

To make perfectly clear Prudential's obligation to discharge the liability imposed upon Land, however, attention is again directed to Endorsement No. 3 of Prudential's policy, printed in full at R. 20-21. It reads in part as follows:

> "In consideration of the premium charged, it is understood and agreed that wherever the assured has contracted to protect any *individual,* firm, or corporation by insurance such *individual,* firm, or corporation shall be deemed an assured under this policy but the liability of the underwriters as respects such *individual,* firm, or corporation shall be limited to the amount of insurance contracted to be carried by the assured but in no event shall such liability in the aggregate exceed the underwriters' limit of liability as expressed in this policy. It is understood, however, that this policy does not insure any individual, firm, or corporation *whose operations or business is not incidental or necessary to the business of the assured herein named."* (Emphasis supplied.)

It is submitted that clearly Land is covered by Prudential's Endorsement No. 3, for certainly Land's business was incidental and even necessary to the business of the named insured.

At page 24 of its brief, Prudential discusses and misquotes is Endorsement No. 3. Prudential's brief at page 24 reads in part as follows:

> "Endorsement 3 on the Prudential policy provides that persons *with* whom the insured (Louis Stores, Inc.) has *contracted* to protect by insurance shall be deemed insureds under Prudential's policy with specified limitations. . . ." (Emphasis supplied to the word "with".)

It is submitted that Prudential, in its discussion at page 24 of its brief, deliberately reads the word "with" into its Endorsement 3, where no such word appears. Prudential thus seeks to imply that Endorsement 3 is restricted to a situation where Louis Stores, Inc., has contracted *with* another person, firm or corporation that Louis Stores, Inc., will protect such other party by insurance. The endorsement, however, is not so restricted. The endorsement speaks for itself. It means that where Louis Stores, Inc., has contracted *with* Ohio Farmers, the underlying insurance company, to protect an individual, firm or corporation by insurance, that then such other party becomes an insured under the Prudential policy. The very type of agreement contemplated by Prudential's Endorsement 3 is the agreement represented by Ohio Farmers' Endorsement 4.

Surely, it is illogical to hypothesize that Prudential's Endorsement No. 3 contemplated some private contract between Louis Stores, Inc., and an unknown party, which contract might be completely unrelated to the Ohio Farmers' insurance policy, and which contract might not even be known to Ohio Farmers. Surely, the type of "contract" contemplated by Prudential's Endorsement No. 3 is a contract relating specifically to the underlying policy upon which the entire policy of Prudential is based. Surely, it contemplated an endorsement to that very policy, which is precisely what occurred.

IV.

CORRECTION OF OTHER ERRORS OR MISSTATEMENTS IN OPPOSING BRIEFS NOT HERETOFORE COVERED.

At the bottom of page 1 of its brief, Prudential says, by way of preliminary statement, that the purpose of the judgment in declaratory relief was to determine the rights, duties and obligations of the parties under their respective insurance policies "to discharge a judgment against Louis Stores, Inc., the assured under said policies. . . ." This statement is patently incomplete. The declaration sought concerned the respective obligations to pay any liability that may be assessed against Louis Stores, Inc., *and its employees,* as indicated by paragraph V of the first amended complaint in declaratory relief, R. 4.

At page 5 of its brief, Prudential says, in the middle of said page, that the "courtesy boy" put the box of distilled water, over which Mrs. Christensen tripped, in the aisle against the shelf or "gondola"; Prudential errs. It was Land himself who pushed the box up against the shelf or "gondola" and left it there, as plainly indicated by Land's testimony, referred to at length in appellant's opening brief, especially Land's testimony 8:8. Farther down in the same page of its brief, page 5, Prudential implies that all Land did was to follow instructions. The statement, at best, is incomplete. It is clear from the testimony of Land and Correia that Land was instructed never to leave a single box in the aisle below eye level, and it was precisely because he did not follow such instructions that the accident happened and Land was held liable.

At the top half of page 8 of its brief, Prudential believes it is clear that the judgment below must be affirmed, unless *both* of the findings questioned are erroneous. Prudential errs. If this Court should find, in its wisdom, that (1) appellees under their policies are obligated to discharge Land's tort obligation, but (2) that Louis Stores, Inc., was somehow independently negligent, and actively negligent, along with Land, and this Court were to make such declaration, then we should have a situation of joint tort-feasors. Between joint tort-feasors, there is no right of contribution under the law of California, *Smith v. Fall River Joint Union High School District,* 1 Cal. 2d 331, 34 P. 2d 994. In such a situation, therefore, the State Court

judgment creditor would be free to seek satisfaction of judgment against whichever tort-feasor or whichever set of carriers she chose.

At page 37 of Prudential's brief, and at pages 22-23 of Ohio Farmers' brief, reference is made to *American President Lines, Ltd. v. Marine Terminals Corp.,* 234 F. 2d 753. As a preliminary matter, appellant asks this Court to consider all applicable law in a declaratory relief case, just as it asked the District Court below. It could not, however, have asked the District Court below to consider this particular precedent, inasmuch as it was not yet printed. The opinion below is dated April 20, 1956, and the precedent in 234 F. 2d 753 is dated June 14, 1956.

Appellees also seek to distinguish the *American President Lines* case on the ground that it rested purely on the contract between the parties involved. It is true that the Court stated it preferred so to rest its decision. The Court also said, however, that the doctrine of passive versus active negligence applied. As this Court said at 234 F. 2d 757:

> "In the instant case the Court below found that 'the plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks.'
>
> Under these views it would appear that American being guilty of passive negligence could recover indemnity from Marine because of its active and primary negligence in permitting the work to continue under known unsafe conditions."

The Court went on to say that it preferred to rest its decision upon another ground only because a question of statutory construction of the Longshoremen's and Harbor Workers' Compensation Act would be left open under the passive and active negligence ground.

CONCLUSION.

Appellees are obligated under their policies to discharge the State Court judgment against Clifton Land. Hence, he is an "insured" under their policies, whether or not they choose to call him such; for the term "insured" represents a legal conclusion.

Appellant has proved that the State Court trier of fact found Clifton Land negligent and that therefore his employer Louis Stores, Inc., was also held liable on the theory of *respondeat superior*. Appellees have failed to show any evidence of any other basis of liability on the part of Louis Stores, Inc. Correia, the store manager who instructed Land and who decided how many people would be on duty at the time in question, was exonerated of negligence by the jury. In any event, Clifton Land's negligence was active, and the negligence of Louis Stores, if any, was passive. Hence, the judgment of the District Court should be reversed and the rights and obligations of the parties to this proceeding should be declared as follows:

(1) Defendants-appellees are obligated under their respective policies to pay the liability assessed

against Clifton Land in the Alameda County Superior Court action; and

(2) The liability of Clifton Land and his insurers is primary to that of Louis Stores, Inc., and its insurers; so that the latter are entitled to indemnity.

Dated, San Francisco, California,
May 1, 1957.

Respectfully submitted,
EDWARD A. FRIEND,
Attorney for Appellant.